

ILLINOIS POLLUTION CONTROL BOARD
MARCH 9, 1989

IN THE MATTER OF:)
)
AMENDMENT TO 35 ILL. ADM. CODE) R88-22
SECTION 304.301, EXCEPTION FOR)
AMMONIA NITROGEN WATER QUALITY)
VIOLATIONS)

ORDER OF THE BOARD (by R. C. Flemal):

On February 6, 1989, the Citizens Utilities Company of Illinois ("Citizens") filed a Motion for Rehearing in this proceeding. In its Motion, Citizens claims (1) that the R88-22 rulemaking proceeding has been procedurally deficient, depriving Citizens of sufficient notice and opportunity to comment on the proposed amendments, and (2) that the small discharger exemption contained in 35 Ill. Adm. Code 304.301(a) is still necessary. Citizens moves the Board to grant rehearing "for the purpose of vacating its January 5, 1989 [Second Notice] Opinion and Order and enter an Order reinstating [the] Section 304.301(a) small discharger exemption." The Board withheld the submission of this rulemaking to the Joint Committee on Administrative Rules pending disposition of this motion.

On February 24, 1989, the Illinois Environmental Protection Agency ("Agency") filed its response. On February 28, 1989, Citizens filed a reply to the Agency's response. The Board finds that under its procedural rules, a moving party does not have the right to reply to a response, except as permitted by the Hearing Officer or Board (35 Ill. Adm. Code 103.140(c)). The Board denies Citizens leave to file its reply. In addition, the Board notes that it chooses to address Citizens' motion, even though it was filed after the time for filing comments and motions under the Board's procedural rules (35 Ill. Adm. Code 102.163 and 102.200(a)). The Board emphasizes that it discourages the recent practice of filing post-second notice motions.

It is necessary at the onset of the Board's discussion of these matters to relate some key aspects of the procedural history of the R88-22 proceeding. On January 21, 1988 the Board issued a Request for Public Comment in R88-1, Miscellaneous Amendments to 35 Ill. Adm. Code. The Board requested comment upon, inter alia, the following proposed change:

Repeal of Section 304.301. Section 304.301 deals with exceptions for ammonia nitrogen water quality violations. All of the provisions of the Section terminate after July 1, 1988. Therefore, after that

date the entire Section may become superfluous. The proposal is therefore to initiate repealing of this Section now, such that at some date after July 1, 1988, when the instant omnibus rulemaking is completed, the surplusage may be removed from the regulations.

Request for Public Comment at 4

Shortly after its adoption by the Board, the Request for Public Comment was mailed to various persons with an interest in the Board's rulemaking proceedings, including Citizens' attorney. The Board allowed over three months for comment on the various changes suggested in R88-1. No comment was received from Citizens regarding the repeal of Section 304.301, or any other part of R88-1, during that time. The only comment regarding Section 304.301 received by the Board during that time was from the Agency. The Agency discussed, inter alia, Section 304.301(a):

Paragraph (a) was adopted to allow existing small sources additional time to provide for nitrification in a cost-effective manner. Typically this is accomplished as the need for additional treatment capacity or normal upgrading arises. This provision is no longer necessary, as sufficient time has passed for such sources to have met their needs.

The Agency, however, proposed a three year extension of the ammonia nitrogen winter exemption contained in Section 304.301(b).

By its terms, the exemptions contained in Section 304.301 expired on July 1, 1988 (See Section 304.301(d)).

On August 18, 1988, the Board sent the Agency's proposed revisions to 304.301 to First Notice in R88-22. This action was consistent with provisions of Res 88-1. As stated in its Order, the Board believed that the Agency's proposed amendments were more properly considered in a dedicated docket. The Board also discussed the Agency's comments in the First Notice Opinion and Order in R88-1, stating:

The Board believes that the Agency's proposal to extend the deadline may have merit. However, the Board believes that this proposal is of sufficient substantive content that it would be best considered within a dedicated docket. Accordingly, on August 18, 1988 the Board by separate order and docket sent this portion of the Agency's recommendation to first notice.

R88-1, Sept. 8, 1988, Slip Op. at 3.

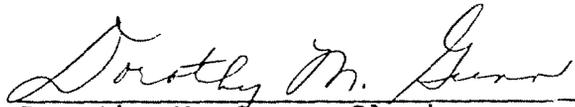
Again, various persons were sent copies of the Board's Orders in R88-1 and R88-22, including Citizens' attorney.

Although the drafting of the proposed regulation as it was sent to First Notice in R88-22 may have indicated that the new proposed termination date would be applicable to both subsection (a) and (b), the text of the Agency's comment was quoted at length by the Board. The quote exclusively discussed the exemption contained in subsection (b). Even if Citizens could claim that it had no problem with the changes as proposed at that point, it is reasonable that during subsequent hearings the Board would examine the entirety of Section 304.301. Citizens chose not to participate at this point. Two hearings were held in this proceeding, with over a month allowed for comment. All hearings were properly noticed pursuant to the Board's procedural rules and the Environmental Protection Act ("Act") (35 Ill. Adm. Code 102.122 and Ill. Rev. Stat. ch.111-1/2, par.1028 (1987)). As stated in the Board's Second Notice Opinion, the hearings were attended by representatives of the Agency, the Illinois Association of Sanitary Districts, and the Department of Energy and Natural Resources. No one present at either hearing voiced any problem with the expiration of the exemption contained in subsection (a). The Agency's intent to extend only the exemption contained in subsection (b) and not (a) was discussed at hearing (R. 11/4/88 at 88), and by the Board in its Second Notice Opinion, where the drafting of the proposed regulation was changed to effectively reflect that intent. Information was presented which the Board examined and the Board found merit with the Agency's proposed changes. (See, R88-22 1/5/89 Slip Op.)

It is apparent from the procedural history as stated above that Citizens was included in this proceeding through various mailings from the inception of this proceeding in the R88-1 docket. It is noteworthy that in R88-1, when the Board originally proposed deletion of Section 304.301 in its entirety due to its impending expiration, Citizens chose not to comment. This motion is the first instance in which Citizens has voiced any desire to become involved in this proceeding, despite many earlier opportunities to do so. The Board finds that Citizens was afforded adequate notice of the Board's action and given sufficient opportunity to comment under the Board's procedures, the Act, and the Administrative Procedures Act. Citizens' Motion for Rehearing is denied.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 9th day of March, 1989, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board